83-2110 (1)

No. 83-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

CLARKSDALE BAPTIST CHURCH,
Petitioner

v.

WILLIAM H. GREEN, et al.,
and
DONALD T. REGAN, Secretary of the Treasury of the United States, et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

William Bentley Ball*
Philip J. Murren
Sandra E. Wise

BALL & SKELLY
511 North Second Street
P.O. Box 1108
Harrisburg, PA 17108
(717) 232-8731

James Edward Ablard
1312 Vincent Place
McLean, VA 22101
(703) 827-0030

Attorneys for Petitioner

**Counsel of Record*

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

38pp

QUESTIONS PRESENTED

A church, exempt from federal income taxation, operates, as an integral part of its religious mission, a pervasively religious school. The church, by doctrinal mandate, maintains a racially open admissions policy for its school. The injunction order of a federal court, ignoring that policy, establishes a legal presumption that the church's school is racially discriminatory due to the time and place of the founding or expansion of the school and lack of minority enrollment. Unless the church overcomes the presumption, the order requires revocation of the church's tax-exempt status. To overcome this presumption, the order requires that the church furnish proof that it engaged, *inter alia*, in "active and vigorous recruitment programs", "continued, meaningful public advertisements", "meaningful communication" with minority groups and leaders, or furnish "other similar evidence" of attempts to attract minority students and faculty.

1. Is the application of the injunction order invalid because of lack of statutory authority?

2. Does the application of the injunction order deny the church rights of free exercise of religion guaranteed by the First Amendment?

3. Does application of the injunction order excessively entangle government with religion in violation of the Establishment Clause of the First Amendment?

4. Is application of the injunction order invalid because plaintiffs lack standing to maintain this action?

LISTING OF PARTIES

Petitioner

* Clarksdale Baptist Church, Clarksdale, Mississippi (Intervenor Defendant)

Respondents

Plaintiffs:

William H. Green, on his own behalf and on behalf of his minor children, Connie Green and Belinda Green.

Vernon Tom Griffin, on his own behalf and on behalf of his minor son, Vernon Tom Griffin, Jr.

John D. Wesley, on his own behalf and on behalf of his minor children, Shirley Ann Wesley, Florence Wesley and Jessie Lee Wesley.

Warren G. Booker, on his own behalf and on behalf of his minor adopted son, Adam Wayne Gilley.

Essie Bernice Austin.

Defendants:

Donald T. Regan, as Secretary of the Treasury of the United States.

Roscoe Egger, as Commissioner of Internal Revenue.

Intervenor Defendants:

Dan Coit; Lavern Faye Coit, minor; Linda Ann Coit, minor.

---

* In accord with Rule 28.1, Clarksdale Baptist Church states that it is a corporation which has no parent company or subsidiaries (except wholly-owned subsidiaries).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—*(Continued)*

No. 83-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

CLARKSDALE BAPTIST CHURCH,
Petitioner

v.

WILLIAM H. GREEN, et al.,
and
DONALD T. REGAN, Secretary of the
Treasury of the United States, et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this matter on March 22, 1984.

REFERENCES TO OPINIONS BELOW

The unpublished memorandum opinion of the United States Court of Appeals for the District of Columbia Circuit in this matter appears as Appendix A hereto.

Prior reported opinions in this matter appear at 309 F. Supp. 1127 (D.D.C. 1970), *appeal dismissed sub nom. Cannon v. Green*, 398 U.S. 956 (1970) (prelimi-

nary injunction); and 330 F. Supp. 1150 (D.D.C. 1971), *aff'd mem. sub nom. Coit v. Green*, 404 U.S. 997 (1971) (permanent injunction).

JURISDICTION

This case was decided and judgment was entered by the United States Court of Appeals for the District of Columbia Circuit on March 22, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment I:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."

Internal Revenue Code:

> *"Sec. 501. Exemption from tax on corporations, certain trusts, etc.*
>
> "(a) *Exemption from taxation.*—An organization described in subsection (c) . . . shall be exempt from taxation under this subtitle. . . .
>
> * * *
>
> "(c) *List of exempt organizations.*—The following organizations are referred to in subsection (a):
>
> * * *
>
> "(3) Corporations, and any community chest, fund or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary or educational purposes, or to foster national or international sports competition . . ., or for the prevention of cruelty to children or animals. . . ."

STATEMENT OF THE CASE

A. Statement of Facts.

Clarksdale Baptist Church is an evangelical Christian Church, and a member of the Southern Baptist Convention.[1] It operates the Clarksdale Baptist School as an integral part of its religious mission. The Clarksdale Baptist School was opened in 1964, in direct response to the Supreme Court's Bible-reading decision in *Abington Township v. Schempp*, 374 U.S. 203 (1963). Planning for the Clarksdale Baptist School took place in 1961 and 1962 by the Church's pastor, Reverend Lucius Marion, and others. Planning was begun well before any public school desegregation order in the City of Clarksdale, and the founding of the School was not motivated by local school desegregation. The founding of the Clarksdale Baptist School is typical, and a part, of the great surge in evangelical Christian education nationwide begun in 1950. In this, it is similar to other Christian schools in the State of Mississippi, and elsewhere in the United States (*e.g.*, Oregon, Maine, New York, etc.).

The School operates in grades K-9, is operated solely for religious purposes, and religion pervades its entire life. Religious considerations extend, *inter alia*, to curriculum, teaching, counseling, prayer, devotions, dress, discipline and activities. The School is not, in any sense, a "secular" undertaking. All courses taught at Clarksdale Baptist School are religious in content, are taught from a religious perspective, and are justified and explained in their relation to Scripture and to the Deity. The School constitutes a distinctive faith community wherein the pastor, teachers, parents, administrators and students strive for religious ends and form a single

1. Since this petition arises from the granting of a summary judgment, it must be assumed that the district court treated the facts, including any inferences therefrom, placed in evidence by Clarksdale Baptist Church (the party opposing the summary judgment) as true. *Bishop v. Wood*, 426 U.S. 341, 347, n.11 (1976).

faith-nurturing organism. All children who enroll in Clarksdale Baptist School must be receptive to instruction in the beliefs of the Church. The School does not tailor its curriculum or activities in any way to accommodate children of parents who are not members of the Church.

Clarksdale Baptist School has never discriminated on the basis of race in any admissions or hiring practices, but rather teaches, as an article of faith, that all men of all races are equal in the sight of God. This belief precludes it from employing racial criteria in evangelization, admissions or hiring. After finishing the ninth grade at Clarksdale Baptist School, a majority of the students enroll at integrated public schools.

The petitioner, Clarksdale Baptist Church, has sought modification of two federal district court orders directing the Internal Revenue Service to implement certain procedures, related to racial nondiscrimination requirements, in reviewing the tax-exempt status of church-operated schools, and their sponsoring churches, in the State of Mississippi. The Church has challenged the validity of these orders as applied to the Church in the conduct of its school ministry.

B. Course of Proceedings.

On June 30, 1971, a permanent injunction was entered in *Green v. Connally*, 330 F. Supp. 1150 (D.D.C. 1971), *aff'd sub nom, Coit v. Green*, 440 U.S. 997 (1971), directing the Secretary of the Treasury to refuse to recognize the tax exemption of racially discriminatory educational institutions located in the State of Mississippi. (See Appendix D hereto). The case had been brought in 1969 under 28 U.S.C. §§1331, 1340, 1343, 1346 and 1361 by a group of parents of black children enrolled at that time in public schools in Mississippi. (D.D.C. Docket No. 69-1355). No church or other religious claimant was heard, and no Religion Clause claim

was raised in that case. Judge Leventhal, in his opinion therein, expressly declined to consider any issues pertaining to tax exemption of religious bodies. 330 F. Supp. at 1168-1169.

Not satisfied with the enforcement procedures of the Internal Revenue Service under the 1971 injunction, the plaintiffs, on July 23, 1976, petitioned the United States District Court for the District of Columbia to reopen the *Green* case and to grant further injunctive relief, requesting that Court to direct the implementation of more aggressive enforcement procedures. At the same time, another group of plaintiffs (represented by the same counsel) filed an additional suit, seeking the same relief sought in *Green*, but on a nationwide basis. This additional suit was then captioned *Wright v. Simon* (D.D.C. Docket No. 76-1426). The *Green* and *Wright* cases were thereafter consolidated for disposition by the district court.

During the pendency of the *Green* and *Wright* cases, the Internal Revenue Service dropped its opposition to the plaintiffs' claims, and sought to implement the relief requested by the plaintiffs by issuance of a new Revenue Procedure. Such a proposed Revenue Procedure was thus announced on August 22, 1978, and published at 43 Fed. Reg. 37296. After a storm of public protest, the Service withdrew its proposal and issued a substitute on February 13, 1979 (44 Fed. Reg. 9451). However, implementation of the proposed Procedure ("or any part thereof") was blocked by Congress by means of the "Ashbrook" and "Dornan" amendments to the Treasury, Postal Service, and General Government Appropriations Act of 1980, P.L. 96-76, 93 Stat. 559, §§103 and 615 (1979).

Thus prevented from pursuing administrative implementation of their revised enforcement procedures, the plaintiffs and the Internal Revenue Service returned to the district court. On November 26, 1979, the district court separated the *Green* and *Wright* cases, dismissing

the *Wright* case for, *inter alia,* lack of standing. *Wright v. Miller,* 480 F. Supp. 790. The district court's *Wright* decision was subsequently reversed (*Wright v. Regan,* 656 F.2d 820 (D.C. Cir. 1981)), and the Supreme Court has now granted certiorari and heard oral argument therein (*Allen v. Wright,* No. 81-757 and *Regan v. Wright,* No. 81-970). The district court retained jurisdiction over the *Green* (or Mississippi-only) component of the previously consolidated case, and proceeded to issue an injunction decree, without opinion, on May 5, 1980, directing the Internal Revenue Service to follow detailed guidelines in assessing the eligibility of Mississippi schools for tax exemption. (See Appendix B hereto). On June 2, 1980, the district court issued, again without opinion, an "Order Clarifying and Amending Court's Order and Permanent Injunction of May 5, 1980." (See Appendix C hereto). The government defendants failed to file timely appeals from these two orders. These orders, for the first time, expressly included church-related schools in their scope, despite the fact that no church-operated or other private schools were represented before the district court in the *Green* litigation. The orders contained the "presumption of guilt-affirmative action" features which are here challenged.

After unsuccessful attempts by church-operated schools in Jackson, Mississippi and Hattiesburg, Mississippi to intervene in the *Green* case subsequent to the district court's May-June, 1980 orders, the Clarksdale Baptist Church of Clarksdale, Mississippi (the petitioner herein) was permitted to intervene on May 14, 1981. On June 5, 1981, the Clarksdale Baptist Church (which operates a religious day school for grades K-9) filed a motion requesting the district court to modify its May-June orders in light of issues which had not previously been litigated. These issues related, *inter alia* to the asserted denial, by the court's orders, of the Church's rights under the Religion Clauses of the First Amendment. The district court permitted testimony on this motion (and on

a counter motion for summary judgment filed by plaintiffs) by deposition only, refusing to receive any evidence in open court. On January 6, 1982, the district court stayed all proceedings, pending the outcome of the case of *Bob Jones University v. United States,* then filed in the Supreme Court (Docket No. 81-3).[2]

After the Supreme Court's decision in the *Bob Jones* case (103 S. Ct. 2017) the district court vacated its stay herein, and, on July 22, 1983, entered summary judgment in favor of the plaintiffs, re-imposing its May-June, 1980 Orders. The district court, however, stayed enforcement of its Orders for a period of twenty days in order to permit the Clarksdale Baptist Church to seek a further stay from the United States Court of Appeals for the D.C. Circuit. On August 11, 1983, an additional interim stay was ordered by the district court; that lapsed when the Church's motion for stay pending appeal was denied by the Court of Appeals on August 18, 1983. Subsequent applications for stay by the Church were denied by Justice Brennan (September 7, 1983), and by the full Supreme Court (October 3, 1983).

Argument proceeded in the Court of Appeals, and that Court ordered the appeal dismissed on March 22, 1984. (See Appendix E hereto).

---

2. Shortly thereafter, the plaintiffs moved the district court to vacate this stay and to grant further injunctive relief on a nationwide basis. The plaintiffs' motion was denied on February 4, 1982, and plaintiffs filed an appeal therefrom (D.C. Cir. No. 82-1134), as well as a petition to the Supreme Court to grant certiorari in advance of judgment by the Court of Appeals (Supreme Court Docket No. 81-1626). The Supreme Court denied the petition on April 19, 1982, *sub nom. Green v. Regan,* 456 U.S. 937, and the appeal in the Court of Appeals was subsequently withdrawn.

REASONS FOR GRANTING THE WRIT

This is a case of first impression which concerns the validity of the application to a church institution of those "more aggressive enforcement procedures" and "more stringent substantive standards", relating to racial nondiscrimination as a qualification for tax exemption, of which this Court spoke, but deferred ruling upon, in *Bob Jones University v. United States,* 103 S. Ct. 2017, 2034, n. 27 (1983). It also involves the question of the standing of individuals to sue to compel removal of tax exemption of a church and school against which they have no claim; this issue of standing now being under active review by the United States Supreme Court in the cases of *Allen v. Wright* (No. 81-757) and *Regan v. Wright* (No. 81-970) (cases which had been consolidated with this one in the district court).

1. The Unconstitutional Procedures Imposed.

The contested orders of the district court create "an inference of present discrimination against blacks" on the part of the Church. For the Church to overcome this presumption it is required to prove its having engaged in "objective acts and declarations" which establish that the policies and practices of its school did not cause racial discrimination.

But several of the "objective acts and declarations" listed by the district court, as the clearly inferred means by which a church could get out from under the presumption, directly impose upon its religious liberty in violation of the Free Exercise Clause and create excessive entanglement between government and a church in violation of the Establishment Clause. Specifically, Clarksdale Baptist Church pointed to these deficiencies in its motion to modify the district court's orders:

> "(a) The Order (paragraph 2) enjoins the Internal Revenue Service to require *inter alia* that, as

a condition of their being accorded recognition of their granted tax exemption, church schools must give proof of 'active and vigorous recruitment programs to secure black students or teachers.' Clarksdale Baptist School was established solely for its stated religious purposes, and no child may be admitted to enrollment except upon a religious basis. And only those persons may teach in Clarksdale Baptist School who are committed to the faith and teachings of the Clarksdale Baptist School and who are approved by the Trustees. The requirement to conduct recruitment of students and teachers not necessarily of its religious faith is a direct denial of fundamental rights of the Church protected by the Free Exercise of the First Amendment.

"(b) But if the obligation to conduct 'recruitment programs' be viewed, not as thus imposing an obligation upon a church in violation of its Free Exercise rights, but rather as an obligation to seek black students and teachers simply for its *religious* purposes, then the effect of this civil court's Order is to impose upon a Church an obligation to evangelize. The Order, so interpreted, is in plain violation of the Establishment Clause of the First Amendment.

"(c) The Order's requirement respecting advertising is a government requirement that Clarksdale Baptist Church incur expenses and engage in a public activity in no way germane to its purposes, which are religious. Since the Church's School was established solely to accomplish the religious mission of the Church, and to serve the community only insofar as the religious formation of practicing doctrinal adherents of the Clarksdale Baptist Church may be said to serve the community, any advertising of its School, placed by the Church, would necessarily constitute an appeal to obtain adherents to the Baptist faith as practiced by the

Church. But a civil court's Order requiring a church thus to evangelize is at once a violation of Free Exercise rights of that Church and a violation of the Establishment Clause.

"(d) The Order (paragraph 2) enjoins the Internal Revenue Service to require, *inter alia*, that, as a condition of its recognizing the tax exemption of the Church and its School, the Clarksdale Baptist School must give proof of 'meaningful communication between the School and black groups and leaders within the community concerning the School's nondiscrimination policies . . .' The policies against racial discrimination enjoined upon its School by the *Church* are not secular policies nor policies derived from, or existing in response to, decisions of the civil courts in respect to racial discrimination. They are instead a matter of Christian doctrine, based upon the teachings of the Gospel. The provision of the Order requiring communication with groups and leaders of the secular community is *per se* violative of the Church's Free Exercise rights.

"(e) Similarly, the provision of an Order requiring such communication is violative of the Establishment Clause in that it requires the Church to engage in public communication with respect to its doctrinal beliefs rejecting racial discrimination.

"(f) Tax exemption has been held to be an expression of governmental neutrality toward religion. By virtue of the Order, the Church's School is required to disclose extensive information to a government agency to be used for the possible purpose of denying it tax exemption. Requiring such disclosures for such purpose constitutes a forbidden entanglement by government with religion, prohibited by the Establishment Clause of the First Amendment.

"(g) The religious liberty of the Church, intimately related to its tax-exempt status, is made, by

terms of the Order, to depend solely upon the will of secular governmental authorities under language giving those authorities unlimited subjective discretion with respect to, *e.g.*,

— evidence which 'clearly and convincingly' (to I.R.S.) establishes that an inferred racial discrimination does not exist,

— proof of 'objective' (in the view of the I.R.S.) acts and declarations,

— evidence which, though it includes, 'but is not limited to' proof of various things,

— 'evidence of active and vigorous' (in the view of the I.R.S.) recruitment programs,

— 'meaningful' (in the judgment of the I.R.S.) public advertisements, 'meaningful' (in the judgment of I.R.S.) communication with black groups and leaders,

— 'other similar evidence.'

The imposing of requirements thus broadly worded by the Internal Revenue Service is violative of the Church's Free Exercise rights.

"(h) The Order denies due process of law to the Church in that it requires the Internal Revenue Service to exercise powers over the Church's educational ministry which are *ultra vires*, inasmuch as the Congress has forbidden the Internal Revenue Service to engage in such activities by enacting Section 7605(c) of the Internal Revenue Code.

"(i) The Order creates a presumption that the Church through its educational ministry, is racially discriminatory and burdens the Church with having to prove that it is not. The presumption unconstitutionally harms the church in that, without rational basis or justification, it damages the Church's good name and destroys the reverse and proper presumption: namely, that a church under-

takes the religious activity of establishing a school on account of religious reasons.

"(j) The Order unduly burdens the right of a wholly religious enterprise to conduct its religious ministry in education free from government direction, supervision, investigation and evaluation, all in violation of the Religion Clauses of the First Amendment."

Motion to Modify Injunction (June 5, 1981).

The District Court's orders pose momentous problems under the Religion Clauses of the First Amendment. Under these orders, the Internal Revenue Service is required to embark upon a widespread surveillance of religious institutions, and, based upon an "inference of present discrimination" culled from the time and place of a church-school's founding or expansion, follow up that surveillance by demanding "clear and convincing" evidence (*i.e.*, a more exacting standard than "preponderance of the evidence") of recruitment, scholarship, and other programs of affirmative action to secure minority students and faculty for the purpose, in the case of a church-school, of receiving or providing instruction in the church's faith. What is more, every one of the key terms in this piece of judicial legislation is left undefined. No opinion whatever was issued by the district court to provide any source of guidance for the inherently subjective terms and phrases on which the fate of pervasively religious institutions is to turn. Instead, the IRS, the nation's tax collector, is left to its own devices in determining the meaning of those critical passages.

While this Court has pointedly stated that "precision of regulation must be the touchstone in an area so closely touching our most precious freedoms", *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (citing to *N.A.A.C.P. v. Button*, 371 U.S. 415, 438 (1963)), and that government regulation which restricts

First Amendment liberties must exhibit "narrow specificity" (*id.* at 604), the district court in this case has run roughshod over church institutions by:

1. Issuing groundbreaking injunctive orders without opinion, and without even hearing from church institutions.

2. Hearing no live testimony whatever from the church to which it reluctantly and belatedly accorded intervenor status, thus relegating that church to a disadvantageous position among the parties to the litigation.

3. Denying the church's plea to modify its injunctive orders in a summary judgment proceeding, resolving critical issues of fact on the basis of deposition testimony alone.

4. Legislating a presumption that a church operates out of discriminatory motivations, rather than out of sincere religious conviction.

5. Curtly dismissing a plea by IRS attorneys for guidance in permitting religious tolerances by stating: "That's your problem." (Transcript of Hearing, July 8, 1983, p. 43).

6. Forcing a church to undertake affirmative recruitment and similar programs not related to, or even inconsistent with, its religion-based imperatives.

The validity of the district court's orders is thus a matter precisely brought into focus by this Court's statement in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979):

> "It is not only the conclusions that may be reached by the [government agency] which may impinge on rights guaranteed by the religion clauses, but the *very process of inquiry* leading to findings and conclusions." (Emphasis added).

The orders mandate that Clarksdale Baptist Church is to be subjected to court-legislated requirements which constitute, in the Church's view, a "process of inquiry" which is not adequately tailored to the particular exigencies of pervasively religious institutions.

Religious liberties are "preferred" constitutional liberties. See, *e.g.*, *U.S. v. Carolene Products Company*, 304 U.S. 144, 152, n.4 (1938); *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943); and *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 639 (1943). This country's long tradition of concern for fundamental freedoms commands that special regard be shown for these liberties, and that they not be paved over in a headlong rush toward achievement of the secular governmental end of elimination of official support for public school segregation. Actions of government (including those of courts[3]) which burden religious exercise may be permitted only in the name of a "compelling state interest", and then only when the burdensome government requirement can be demonstrated to be the "least restrictive means" of achieving that interest, *Thomas v. Review Board*, 450 U.S. 707, 718 (1981), and where the program of regulation does not excessively entangle government in the administration of the religious institution, *Lemon v. Kurtzman*, 403 U.S. 602, 615, 621 (1971); *Surinach v. Pesquera des Busquets*, 604 F.2d 73 (1st Cir. 1979).

While this Court has held that courts are to "searchingly examine" (*Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972)) the issue of compelling state interest, no evidence of *any* examination of that issue is anywhere to be found in the record of this case. Instead, there is only a complete ignoring of the effects which the district court's overbroad legislative edict imposes upon churches and their ministries.

In *NLRB v. Catholic Bishop of Chicago*, *supra*, this Court warned that, where burdensome regulations are

---

3. *New York Times v. Sullivan*, 376 U.S. 254 (1964).

sought to be imposed upon religious entities, this Court would require a demonstration of the "affirmative intention of the Congress clearly expressed.", 440 U.S. at 501. However, the sole expression of the Congress with respect to these presumption of guilt-affirmative action procedures came by means of the Ashbrook and Dornan Amendments to the Treasury and Postal Service Appropriations Act, P.L. 96-76, 93 Stat. 559, §§103 and 615, wherein the Congress blocked the proposed administrative imposition by IRS of such requirements "or any part thereof." But instead of looking for the "affirmative intention of the Congress clearly expressed", the district court in this case ignored Congressional expressions and actually took the legislative power into its own hands.

2. Respondents' Lack of Standing.

Moreover, the asserted basis for the standing of the district court plaintiffs in this decision does not differ from that asserted by the plaintiffs in the *Wright* cases, *supra*, now under review in this Court. Clarksdale Baptist Church has consistently challenged the standing of the plaintiffs in this case, and continues to plead that it is fundamentally unjust to apply the strictures of the district court's orders to church ministries where the very status of the plaintiffs as litigants is still open to question.

CONCLUSION

For all of the foregoing reasons, a Writ of Certiorari should issue to review the Judgment and Opinion of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

William Bentley Ball
Philip J. Murren
Sandra E. Wise

BALL & SKELLY
511 North Second Street
P. O. Box 1108
Harrisburg, PA 17108
(717) 232-8731

James Edward Ablard, Esq.
1312 Vincent Place
McLean, VA 22101
(703) 827-0030
Attorneys for Petitioners

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WILLIAM H. GREEN	:	
	:	
v.	:	No. 83-1831
	:	
DONALD T. REGAN	:	

MEMORANDUM

After carefully considering the record from the trial court, the arguments of the parties, and the relevant case authorities, we have concluded that the decision and orders of the District Court must be affirmed. In particular, we find the First Amendment issues presented by the Intervenor to be plainly insubstantial. Additionally, the challenges to the plaintiffs' standing must be rejected in light of this court's holding in *Wright v. Regan*, 656 F.2d 820 (D.C. Cir. 1981), *cert. granted*, 103 S. Ct. 3109 (1983). In the event that *Wright* is modified or reversed by the Supreme Court, the Government may choose to return to the District Court for appropriate relief.

Judge Scalia, while agreeing that this disposition is required, notes his view that *Wright* was incorrectly decided with regard to both the issue of standing and the issue of judicial intervention in a matter of enforcement procedure committed to federal agency discretion by law.

March 22, 1984.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILLIAM H. GREEN, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 69-1355
G. WILLIAM MILLER, et al.,	)	
Defendants.	)	

ORDER AND PERMANENT INJUNCTION

This matter having come before this Court on plaintiffs' motion for an order to enforce the decree in *Green v. Connally,* 330 F. Supp. 1150 (D.D.C.), *aff'd sub nom. Coit v. Green,* 404 U.S. 997 (1971), and for further declaratory and injunctive relief, and the plaintiffs having moved for summary judgment, and the defendants having moved for summary judgment, and this Court having considered the entire record including depositions, answers to interrogatories, requests for admissions, pleadings, and other documents submitted by the parties, and oral argument thereon, and it appearing to this Court that there is no genuine issue of material fact, and it further appearing to this Court that the defendants have not violated the order of June 30, 1971, but that

said order requires supplementation and modification, it is hereby

ORDERED, that the permanent injunction entered by this Court on June 30, 1971 remains fully in effect but is supplemented and modified as follows:

> Defendants G. William Miller, as Secretary of Treasury, and Jerome Kurtz, as Commissioner of Internal Revenue, their agents, servants, employees, attorneys, and successors, are enjoined and restrained from according tax-exempt status to, and from continuing the tax-exempt status now enjoyed by all Mississippi private schools or the organizations that operate them, which:
>
> (1) which have been determined in adversary or administrative proceedings to be racially discriminatory; or were established or expanded at or about the time the public school districts in which they are located or which they serve were desegregating, and which cannot demonstrate that they do not racially discriminate in admissions, employment, scholarships, loan programs, athletics, and extracurricular programs.
>
> (2) The existence of conditions set forth in Paragraph (1) herein raises an inference of present discrimination against blacks. Such inference may be overcome by evidence which clearly and convincingly reveals objective acts and declarations establishing that such is not proximately caused by such school's policies and practices. Such evidence might include, but is not limited to, proof of active and vigorous recruitment programs to secure black students or teachers, including students' grants in aid; or proof of continued, meaningful public advertisements stressing the school's open admissions policy; or proof of meaningful communication between the school and blacks groups and black lead-

ers within the community concerning the school's nondiscrimination policies, and any other similar evidence calculated to show that the doors of the private school and all facilities and programs therein are indeed open to students or teachers of both the black and white races upon the same standard of admission or employment.

In order to ensure that defendants have information upon which they can make a preliminary judgment as to whether a private school is actually practicing racial discrimination, the following modifications are made to this Court's 1971 Permanent Injunction:

(3) Provision II(A)(2) of the Permanent Injunction is amended to require that printed notices must be published on a regular basis no less than four (4) times annually for a period of three (3) years in a newspaper of general circulation serving the area from which the school draws its student body.

(4) Provision II(A)(2)(a) is further amended to require that any radio advertisements used by a shool to publicize its policy of nondiscrimination must be broadcast with sufficient frequency to be reasonably designed to reach its intended audience in the minority commmunity. A school employing this method of publicizing its nondiscriminatory policy must supply the IRS with the dates and times of transmission; the radio station used; the tape and a written transcript of the announcement; and both the number of times the message was broadcast on a particular day and the number of times it was broadcast during the year.

(5) Provisions (II)(B)(1)-(3) are amended to require that the information required must be supplied by each school as set forth in Paragraph (1) herein on an annual basis for a period of three (3)

years. The IRS shall not approve or continue the tax-exempt status of any such Mississippi private school which fails to supply any of the required data or other information.

(6) Provisions II(B)(1)-(3) are further amended to require that the following information be supplied on an annual basis for a period of three (3) years:

(a) the race of broad members;

(b) the grades served by the school from its inception to the present;

(c) the date the school opened for the first time and grades served upon opening;

(d) the dates additional grades were added;

(e) whether the school is presently recognized as exempt from federal income taxes;

(1) the date on which the exemption was granted;

(f) whether the school received textbooks from the State of Mississippi under the State's textbook program;

(1) whether the school ever withdrew from such program or whether it was held ineligible to receive textbooks in any judicial or administrative proceeding;

(g) whether any tuition due the school has been waived;

(1) if so, the number of students by race, granted such waiver during each school year.

(7) The defendants are enjoined from continuing in effect any ruling recognizing tax-exempt status of any Mississippi private school as set forth in Paragraph (1) herein unless the showing and information required by the Permanent Injunction as

amended shall be made and supplied within 120 days from the date of this Order, or such additional period, not to exceed 120 days, as defendants may provide on cause shown in order for the school to make the showing or supply the information required hereunder.

(8) The defendants are further enjoined to conduct a survey of all Mississippi private schools as set forth in Paragraph (1) herein, including all such church-related schools, obtaining the information required by the permanent injunction, as amended, described herein, which shall be collected and maintained on an annual basis for each school for a period of three (3) years.

(9) The defendants are enjoined to take all reasonable steps to determine which, if any, church-related schools in Mississippi would come under Paragraph (1) herein.

(10) The defendants are further enjoined to make annual reports to this Court specifying the steps taken to implement the injunctive decree. The first report is to be made at the expiration of six (6) months from the date of this order, and thereafter on July 1 of each succeeding year for a period of three (3) years. It is further,

ORDERED, that, except for the modifications herein, the plaintiffs' motion for summary judgment be, and the same hereby is, denied; and that the defendants' motion for summary judgment be, and the same hereby is, denied.

/s/ GEORGE L. HART, JR.

GEORGE L. HARTS, JR.
United States District Judge

Dated: May 5, 1980

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILLIAM H. GREEN, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action
	)	No. 69-1355
G. WILLIAM MILLER, et al.,	)	
	)	
Defendants.	)	

Filed:
June 2, 1980

James F. Davey
Clerk

ORDER CLARIFYING AND AMENDING COURT'S ORDER AND PERMANENT INJUNCTION OF MAY 5, 1980

Upon consideration of defendants' motion for clarification of this Court's Order and Permanent Injunction of May 5, 1980, and it now appearing that such clarification is appropriate, this Court states that it was its intention that the Order and Permanent Injunction should apply only to Mississippi private schools or the organizations that operate them, which have in the past been determined in adversary or administrative proceedings to be racially discriminatory; or were established or expanded at or about the time the public school districts in which they are located or which they serve were desegregating. It was not this Court's intention to include in its Order Mississippi private schools which had not been determined in adversary or administrative proceedings to be racially discriminatory, or which were established

or expanded prior to the time the public school districts in which they are located or which they serve were desegregating. In order to make clear the Court's intention paragraphs (1), (3), (4), (6), (7) and (8) are amended to read as follows:

> (1) which have *in the past* been determined in adversary or administrative proceedings to be racially discriminatory; or were established or expanded at or about the time the public school districts in which they are located or which they serve were desegregating, and which cannot demonstrate that they do not racially discriminate in admissions, employment, scholarships, loan programs, athletics, and extra-curricular programs.
>
> (3) Provision II(A)(2) of the Permanent Injunction is amended to require that *as to schools set forth in paragraph (1)* printed notices must be published on a regular basis no less than four (4) times annually for a period of three (3) years in a newspaper of general circularion serving the area from which the school draws its student body.
>
> (4) Provision II(A)(2)(a) is further amended to require that *as to schools set forth in paragraph (1)* any radio advertisements used by a school to publicize its policy of nondiscrimination must be broadcast with sufficient frequency to be reasonably designed to reach its intended audience in the minority community. A school employing this method of publicizing its nondiscriminatory policy must supply the IRS with the dates and times of transmission; the radio station used; the tape and a written transcript of the announcement; and both the number of times the message was broadcast on a particular day and the number of times it was broadcast during the year.

(6) Provisions II(B)(1)-(3) are further amended to require that *as to schools set forth in paragraph (1)* the following information be supplied on an annual basis for a period of three(3) years:

(a) the race of board members;

(b) the grades served by the school from its inception to the present;

(c) the date the school opened for the first time and grades served upon opening;

(d) the dates additional grades were added;

(e) whether the school is presently recognized as exempt from federal income taxes;

(1) the date on which the exemption was granted;

(f) whether the school received textbooks from the State of Mississippi under the State's textbook program;

(1) whether the school ever withdrew from such program or whether it was held ineligible to receive textbooks in any judicial or administrative proceeding;

(g) whether any tuition due the school has been waived;

(1) if so, the number of students, by race, granted such waiver during each school year.

(7) The defendants are enjoined from continuing in effect any ruling recognizing tax-exempt status of any Mississippi private school as set forth in paragraph (1) herein unless the showing and information required by the Permanent Injunction as amended shall be made and supplied within 120 days from the date of this *Clarification* Order, or such additional period, not to exceed 120 days, as defendants may provide on cause shown in order for

the school to make the showing or supply the information required hereunder.

(8) The defendants are further enjoined to conduct a survey of all Mississippi private schools as set forth in paragraph (1) herein, including all such church-related schools which come under said paragraph, obtaining the information required by the permanent injunction, as amended, described herein, which shall be collected and maintained on an annual basis for each school for a period of three (3) years.

/s/GEORGE L. HART, JR.
United States District Judge

Dated: June 2, 1980

APPENDIX D

ORDER FOR DECLARATORY RELIEF AND PERMANENT INJUNCTION

[Reprinted From *Green v. Connally*, 330 F. Supp. 1179-1180]

Upon consideration of the motions, oppositions, pleadings, affidavits, exhibits, admissions and depositions of the parties, and after hearing argument, this court for the reasons set forth in the opinion filed herewith hereby enters the following order:

It is this 30th day of June, 1971,

I. *Declaratory Relief*

Declared that:

A. Section 501(c)(3) of the Internal Revenue Code of 1954 does not provide a tax exemption for, and Section 170(a)(c) of the Code, does not provide a deduction for a contribution to, any organization that is operated for educational purposes unless the school or other educational institution involved has a racially nondiscriminatory policy as to students.

B. As used in this Order, the term "racially nondiscriminatory policy as to students" means that the school or other educational institution admits the students of any race to all the rights, privileges, programs and activities generally accorded or made available to students at that school, and which includes, specifically but not exclusively, a policy of making no discrimination on the basis of race in administration of educational policies, applications for admission, of scholarship and loan programs, and athletic and extra-curricular programs.

II. *Permanent Injunction*

Ordered, Adjudged, and Decreed that defendants John B. Connally, as Secretary of the Treasury, and

Randolf W. Thrower as Commissioner of Internal Revenue, their agents, servants, employees, and attorneys are enjoined and restrained as follows:

(A) From approving any application for tax exempt status under Section 501(c)(3) of the Internal Revenue Code of 1954 for any private school located in the State of Mississippi unless such private school makes a showing in support of its exemption application—

(1) That the school has publicized the fact that it has a racially nondiscriminatory policy as to students, meaning that it admits the students of any race to all the rights, privileges, programs and activities generally accorded or made available to students at that school, and further meaning, specifically but not exclusively, a policy of making no discrimination on the basis of race in administration of educational policies, applications for admission, of scholarship and loan programs, and athletic and extra-curricular programs.

(2) That the school has publicized this policy in a manner that is intended and reasonably effective to bring it to the attention of persons of student age (and their families) who are of minority groups, including all nonwhites. Specifically but not exclusively the school must—

(a) if it chooses to publidize this policy in printed notices, caption such notices in such a way as to call attention to the notice, for example bold face heading, and to call attention to its nature as a notice of racially nondiscriminatory policy as to students;

(b) provide reference to its nondiscriminatory policy in its brochures and catalogues and also in any printed advertising which it uses as a means of informing applicants of its programs;

(c) comply with such further requirements as to contents, prominence, and form of publicizing of policy, and as to frequency of reiteration, as the Internal Revenue Service may provide;

(d) certify that it has made no statements, and taken no actions, qualifying or negating its published statements of nondiscriminatory policy as to students.

(B) From approving any application for tax exempt status under Section 501(c)(3) of the Internal Revenue Code of 1954, for any private school located in the State of Mississippi unless such private school has supplied the Internal Revenue Service with the information set forth below, which the court finds material in order for the Service to be in an effective position to determine whether the school has actually established a policy of nondiscrimination, as follows:

(1) Racial composition, as of the pending academic year, and projected so far as may be feasible for the subsequent academic year, of—

(a) Student body,

(b) Applicants for admission,

(c) Faculty and administrative staff.

(2) Amount of scholarship and loan funds, if any, awarded to students enrolled or seeking admission, and racial composition of students who have received such awards.

(3) (a) Listing of (i) incorporators, founders, and board members; (ii) donors of land or buildings, whether individuals or organizations, and (b) a statement as to whether any of the foregoing have an announced identification as an organization having as a primary objective the maintenance of segregated school education, or have an announced identification as officers of or active members of such an organization.

(C) From continuing in effect any ruling recognizing tax exempt status of a private school in Mississippi, unless the showing and information set forth in (A) and (B) shall be made or supplied within 90 days from the date of issuance of this Order, or such additional period, not to exceed 90 days, as defendants may provide on cause shown in order for the school to make the showing or supply the information required hereunder.

(D) From approving under Section 170(a) through (c) of the Internal Revenue Code of 1954 the deductibility of any contribution made since June 26, 1970, to a private school in Mississippi if at the time of such contribution the school would not have been entitled, consistent with the terms of this Order, to approval or maintenance of tax exempt status.

III. All prayers of Plaintiffs not herein granted, and all prayers of Intervenors, are hereby denied.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1831

September Term, 1983

WILLIAM H. GREEN — Civil Action No. 69-01355

v.

DONALD T. REGAN

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Before EDWARDS and SCALIA, *Circuit Judges*, and SWYGERT,* *Senior Circuit Judge*, United States Court of Appeals for the Seventh Circuit

JUDGMENT

This cause came to be heard on the record on appeal from the United States District Court for the District of Columbia, and was briefed and argued by counsel. On consideration of the foregoing, it is

ORDERED and ADJUDGED, by this Court, that this appeal is hereby dismissed, for the reasons set forth in the accompanying memorandum.

Per Curiam
For the Court

GEORGE A. FISHER
Clerk

Dated: March 22, 1984

---

* Sitting by designation pursuant to 28 U.S.C. §294(d) (Supp. V 1981).